

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

Appellant's Opening Brief

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Upon Appeal from the District Court of the United
States for the District of Arizona.

Service of the within and receipt of three copies there-
of is hereby admitted this.....day of.....,
A. D. 1945.

DARNELL & ROBERTSON,

By.....

Attorneys for Appellee

FILED
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**United States
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STATEMENT OF JURISDICTION

City of Tucson, a municipal corporation, appellant herein plaintiff below, commenced this action originally in the Superior Court of the State of Arizona, in and for the County of Pima, against the Tucson Gas, Electric Light and Power Company, a corporation, appellee herein, defendant below (T.R. 2-22). Thereafter appellee filed in said court its verified petition for removal of said action to the District Court of the United States,

for the District of Arizona (T.R. 22-26) together with a surety bond for removal (T.R. 27-29) whereupon said Superior Court entered its order for removal without objection on the part of appellant (T.R. 30). The cause was then removed to the District Court of the United States, for the District of Arizona, and all further proceedings were had therein. (T.R. 31) (28 U.S.C.A. Sections 41 and 71).

Appellee filed its motion to dismiss the complaint herein upon the ground that said complaint failed to state a claim against the appellee upon which relief could be granted (T.R. 32-34) and subsequently appellee filed an amendment of said motion to dismiss presenting additional grounds why the complaint failed to state a claim against the appellee upon which relief could be granted (T.R. 36-39).

The District Court granted said motion to dismiss and amended motion to dismiss without filing an opinion, and appellant not pleading further, final judgment was entered dismissing the action (T.R. 42-44).

Within the statutory time appellant filed its notice of, and bond for costs on, appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the purpose of appealing from the final judgment of said District Court (T.R. 45-48), (28 U.S.C.A. Section 225).

STATEMENT OF THE CASE

This action was brought by appellant herein, plaintiff below, to condemn the property of appellee herein, defendant below. Appellant is a municipal corporation duly organized, existing and operating under a so-called home rule charter, as authorized under the provisions of Article XIII of the Constitution of Arizona and under and by virtue of the provisions of Sections 16-301 to 16-303 inclusive, Arizona Code, Annotated, 1939, since the year 1929, and is located within Pima County, State of Arizona. Appellee is a corporation duly organized and existing under the laws of the State of Colorado and is duly authorized to, and is transacting business within the State of Arizona and Pima County, and is engaged in the business of generating, distributing and supplying electric light and power and artificial gas to the appellant and to its inhabitants, and to consumers located outside of the City of Tucson and within the State of Arizona (T.R. 2).

The complaint on which the action is based was originally filed in the Superior Court of the State of Arizona, in and for the County of Pima, on the 12th day of January, 1944. By said complaint, appellant sought to acquire all properties of appellee, within the City of Tucson, together with all properties located without the City of Tucson and within the State of Arizona, for the purpose of supplying electric light and power and natural and artificial gas to the City of Tucson and its inhabitants, as well as to consumers located outside of the City of Tucson and within the State of Arizona and within the area in which the appellee is now operating and supplying such commodities and services (T.R. 17-18).

Upon filing of said complaint summons forthwith issued to said appellee and service thereof was had upon said appellee on January 17, 1944.

Thereafter, upon petition of appellee, the cause was removed to the District Court of the United States, for the District of Arizona (T.R. 22-32). After removal to the District Court appellee moved the court to dismiss the complaint upon the ground that said complaint failed to state a claim against the appellee upon which relief could be granted and in support of said motion set forth various points (T.R. 32-34). Subsequent thereto an amendment of the motion to dismiss was filed by appellee setting forth a further ground or reason why the said complaint failed to state a claim against the appellee upon which relief could be granted, together with additional points or authorities in support of said motion to dismiss (T.R. 36-39).

The motion to dismiss and the amended motion to dismiss came on regularly for oral argument before the court and was duly argued and submitted and by the court taken under advisement (T.R. 35-42).

Thereafter the court entered its order granting said motion and amended motion to dismiss, and plaintiff not pleading further, the said District Court on the 20th day of September, 1944 entered its final judgment dismissing the action (T.R. 43-44).

From said final judgment dismissing the action this appeal is taken (T.R. 45-46).

SUPPLEMENT TO STATEMENT OF THE CASE

For a supplement to the foregoing statement of the case and as an appendix to appellant's brief, and for the further information of the Court, appellant submits that the operations of appellee within the City of Tucson are conducted and are being carried on under and by virtue of a franchise from appellant, and that the operations of appellee outside of the City of Tucson as alleged in the complaint are being conducted and carried on by appellee without franchise from any municipality or other consumers.

Further, that prior to the argument on the motion to dismiss, March 6, 1944, (T.R. 35) and subsequent to removal of said cause to the District Court, January 31, 1944, (T.R. 30-31), at a special election duly called and held for the purpose, on February 24, 1944, a majority of the taxpayers, who were qualified electors voted in favor of appellant acquiring the property and interest in property belonging to the appellee and described in the complaint, and in February 28, 1944, said vote was duly canvassed and the proposition was duly declared to have been carried and adopted (Extract From Council Minutes February 28, 1944—Appendix pages 1-2), and thereafter on February 28, 1944, the Mayor and Council of appellant duly passed and adopted a resolution ratifying and confirming the resolution referred to in paragraph X of appellant's complaint, (T.R. 19), and ratifying, confirming and approving any and all acts performed by the City Attorney and any and all other officers and agents of the appellant in pursuance thereof. (Resolution No. 1964, Appendix pages 3-4).

SPECIFICATION OF ERRORS

Specification of Error No. 1

The District Court erred in granting Appellee's motion and amended motion to dismiss the complaint herein for the reason that under the Constitution and Laws of the State of Arizona and the provisions of the Charter of the City of Tucson, Appellant is given the right, power and authority to condemn the property and interests in the property, described in said complaint, for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and artificial gas for the City of Tucson and its inhabitants and to consumers located outside of said city and within the State of Arizona and within the area presently served by the Appellee herein.

Specification of Error No. 2

The court erred in granting appellee's motion and amended motion to dismiss the complaint herein for the reason that the complaint of Appellant sufficiently sets forth the allegations required to be contained in a complaint for condemnation of the property and interest in property described in said complaint, by the Constitution and Laws of the State of Arizona and the Charter of Appellant.

Specification of Error No. 3

The District Court erred in granting Appellee's motion and amended motion to dismiss the complaint here-

in for the reason that Appellant's complaint is invulnerable against a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to rule 12 (b) of the Rules of Civil Procedure For the District Courts Of The United States.

PROPOSITIONS OF LAW

I.

(Pertaining to Specification of Error No. 1)

The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein.

II.

(Pertaining to Specification of Error Nos. 2 and 3)

The complaint herein, contains sufficient allegations on which the right of Appellant to exercise eminent domain and to condemn the property of Appellee can be adjudged by the District Court, and is invulnerable against a motion to dismiss under the provisions of rule 12 (b) of the Rules of Civil Procedure for the District Courts of the United States.

SUMMARY OF ARGUMENT

Proposition of Law No. I

(Pertaining to Specification of Error No. 1)

The legislature of Arizona has delegated the power to exercise the right of eminent domain and to condemn

Apellee's property, to the Appellant through the medium of Appellant's home rule charter and express provisions of the Arizona Code, Annotated, 1939.

Proposition of Law No. II

(Pertaining to Specification of Error Nos. 2 and 3)

(a) Complaint Invulnerable

The rules of civil procedure for the District Courts of the United States expressly provides that in proceedings in eminent domain, said rules do not apply, (rule 81 (a) (7) ; 28 U.S.C.A. following section 723 c), therefore a motion to dismiss made under rule 12 (b) of said rules should be denied.

(b) Allegations of Complaint sufficient

Appellant has met the requirements of the eminent domain statutes concerning the contents of its complaint, therefore the motion to dismiss said complaint for failure to state a claim on which relief could be granted, should be denied.

ARGUMENT

Proposition of Law No. I**(Pertaining to Specification of Error No. 1)**

The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee Utility as described in the Complaint herein.

The authority to exercise the right of eminent domain and to condemn property, for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and artificial gas to inhabitants and to consumers, including other municipalities, located outside of their boundaries and within the State of Arizona and within the area presently served by the Appellee herein, is expressly given to municipal corporations of Arizona, pursuant to the following provisions of the Arizona Code, Annotated, 1939;

Sections 16-602 to 16-605 inclusive;

Sections 16-2601 to 16-2619 inclusive;

Sections 27-901, 27-906 to 27-916 inclusive;

In addition to the foregoing statutory provisions the Appellant, operating under the provisions of a so-called home rule or freeholders charter pursuant to Article XIII, sections 2, 3 and 5, of the Constitution of Arizona, and of sections 16-301 to 16-304, inclusive, Arizona Code, Annotated, 1939, is expressly authorized to exercise the right of eminent domain and to condemn property for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and

artificial gas to its inhabitants and to consumers, including other municipalities, located outside the City and within the State of Arizona and within the area presently served by the Appellee, under and by virtue of the following provisions of Chapter IV, section I of said Charter, to-wit:

- Sub-section (4) page 5.
- Sub-section (7) page 6.
- Sub-section (22) page 9.
- Sub-section (24) page 9.
- Sub-section (29) page 10.

The authority to exercise the right of eminent domain and condemnation given Appellant under the foregoing provisions of the statutes and charter may be readily classified into three groups, as follows:

1. When financing is to be by the issuance of general obligation bonds.
2. When financing is to be by the issuance of revenue bonds.
3. When proceedings are under the general eminent domain statutes.

When the financing is to be by the issuance of general obligation bonds, the cities of Arizona, in addition to the powers already vested in them by their respective charters and by the general laws of the state, have the powers set forth in Article 6, volume I, Arizona Code, Annotated, 1939, being sections 16-601 to 16-614, and

with specific reference to sections 16-602 to 16-605 inclusive, may exercise the right of eminent domain in the exercise of such additional powers, the procedure to be followed, being that as outlined in said sections, namely, authorization at election, section 16-603; purchase by municipality when the municipality is at the time being served by a public utility under an existing franchise, the compensation required to be paid the utility in such event being equivalent to that as determined under the provisions of sections 27-901 to 27-921, Arizona Code, Annotated, 1939, provided, that cities are relieved from purchasing said utility in the event of wilful and persistent violations of such franchise. (sections 16-604 and 16-605, Arizona Code, Annotated, 1939).

When the financing is to be by the issuance of revenue bonds the municipalities in Arizona, in addition to the powers they otherwise have, have the further powers set forth in Article 26, Cumulative Pocket Supplement, volume I, Arizona Code, Annotated 1939, being sections 16-2601 to 16-2619 inclusive, and with specific reference to section 16-2603, may exercise the right of eminent domain in the exercise of such additional powers, the procedure to be followed being that as outlined in said sections, subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code, Annotated, 1939, and without regard to the requirements, restrictions, or other provisions contained in any law, including, but not limited to, sections 16-602 and 16-603, Arizona Code, Annotated, 1939, (section 16-2618).

Appellant in its complaint (T.R. 19) has alleged that it proposes to finance the acquisition under the provisions

of Chapter 31, Laws 1943, being sections 16-2601 to 16-2619 inclusive, and therefore submits that by virtue of the Charter provisions herein referred to and sections 16-2601 to 16-2619 inclusive, Appellant has the right, power and authority to exercise the right of eminent domain and to condemn the property of Appellee in the manner and form contemplated by its complaint herein.

ARGUMENT

Proposition of Law No. II

(Pertaining to Specification of Error Nos. 2 and 3)

The Complaint herein contains sufficient allegations on which the right to exercise eminent domain and to condemn the property of Appellee can be adjudged by the District Court and is invulnerable against a motion to dismiss under the provisions of Rule 12 (b) of the Rules of Civil Procedure for the District Courts of the United States.

(a) Complaint Invulnerable.

Appellee's motion and amended motion to dismiss the complaint in the District Court was made under the provisions of Rule 12 (b) of the rules of civil procedure for the District Courts of the United States, (T.R. 32). These rules are inapplicable to proceedings for condemnation of property and the law of the state where the property is situated governs the practice, pleadings, forms and proceedings in such actions.

Cyc. of Federal Procedure, Vol 3, Chapter 8,
section 760, pages 446, 447;

United States v. 243.22 Acres of Land, 41 F. Supp. 469;

Rule 81 (a) (7) Rules of Civil Procedure, 28 U.S.C.A. following section 723 c;

therefore the complaint is invulnerable against a motion to dismiss made under said rules.

(b) Allegations of Complaint Sufficient.

Appellee, on its argument below in support of the motion to dismiss and the amended motion to dismiss advanced numerous and sundry reasons for granting the said motion and amended motion. No opinion was filed nor comment made by the District Court when the order granting said motion and amended motion was entered. Appellant is therefore unable to discuss the specific point or points on which the District Court based its order. It is however submitted that,

“When a state delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such authority provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.”

McQuillin Mun. Corp. 2d Ed. Revised, Volume 4, section 1654, at top of page 645.

It is further submitted, that in the absence of a specific statutory requirement an election need not be held prior to the institution of condemnation proceedings;

Public Service Co. v. City of Loveland, 245 Pac.
493 to 498;

that the procedure for condemnation of real estate may
be properly applied to the condemnation of public util-
ities;

*Mayor and Alderman of Town of Madisonville
v. Cagle* 21 S.W. (2d) 385 at 386;

Public Service Co. v. City of Loveland, 245 Pac.
493.

and that if the procedure set forth in section 16-2601
to 16-2619 Arizona Code, Annotated, 1939, is deemed
inadequate the general statutory provisions covering the
exercise of eminent domain regardless of the method
of financing, being sections 27-910 to 27-916 inclusive,
Arizona Code, Annotated, can and do supplement the
same and present an adequate method for the exercise
of the power of eminent domain and condemnation in
Arizona.

In re Forsstrom, 44 Ariz. 472 at 478, 479;

Arizona Code, Annotated, 1939, Section 16-
2618.

Appellant's complaint showed upon its face;

That Appellant is a municipal corporation with-
in the State of Arizona, (T.R. 2).

That Appellee is engaged in public utility busi-
ness, electric light, power and gas. (T.R. 2).

That Appellee owned property and interest in property which are devoted to a public use and were used and useful by the Appellee in conducting said utility, describing said property and interests in property. (T.R. 17).

That the property and interests sought to be condemned are to be used for the purpose of supplying said utilities to the City of Tucson and its inhabitants, as well as to consumers outside said city and within the State of Arizona. (T.R. 17-18).

That the property and interests sought to be condemned constitutes all the property of Appellee used or useful for the purpose of supplying the said utilities. (T.R. 18).

That the taking of said property is for a public use and such taking is necessary for the operation and maintenance of a municipally owned utility and for supplying the Appellant and its inhabitants and consumers without the City and within the State and within the area presently served by Appellee. (T.R. 18).

That the property sought to be condemned is now devoted to a public use and that the public use to which it is sought to be applied by Appellant is a more necessary public use. (T.R. 19).

That the acquisition is to be financed pursuant to the provisions of the Municipal Revenue Bond Act of 1943, being Chapter 31, Laws 1943, sections 16-2601 to 16-2619, inclusive. (T.R. 19).

That the Mayor and Council of Appellant by resolution duly found and declared the property was necessary to the uses of the Appellant as set forth in the complaint and authorized the condemnation action to be instituted. (T.R. 19).

CONCLUSION

In view of the foregoing it is respectfully submitted that the final judgment of the Court below dismissing Appellant's complaint should be reversed and the cause remanded with directions to the trial court to enter judgment denying Appellee's motion to dismiss Appellant's complaint.

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Attorney for Appellant.

APPENDIX

EXTRACT FROM THE MINUTES OF A MEETING OF THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA.

The Mayor and Council of the City of Tucson met in Special Session in the Council Chamber in the City Hall of the City of Tucson, Arizona, at 7:30 o'clock P. M. on the 28th day of February, 1944, all members having been notified of the time and place thereof.

Present: Councilmen Frank E. Dawson, Fred E. Lee, W. S. Nicholas, J. O. Niemann; Henry O. Jaastad, Mayor; Carl M. Hitt, City Clerk.

Absent: Councilmen William H. Codd and Homer L. Shantz, Jr.

The Mayor declared a quorum present.

"The Mayor announced that this was the time and place designated by law for opening and canvassing the returns of the City Special Election held on February 24, 1944, and declaring the results thereof. The City Clerk presented sealed envelopes containing the official returns of said election, and on motion by Councilman Niemann, seconded by Councilman Lee and unanimously carried, the sealed envelopes containing the official returns of the City Special Election held on February 24, 1944, as submitted by the various election boards, were opened, the votes were canvassed and the returns declared to be as follows:

ACQUISITION OF LOCAL UTILITY PROPERTIES

WARD	YES	NO	SPOILED	REJECTED	TOTAL VOTES
1	136	176	None	None	312
2	202	120	None	None	322
3	230	166	None	None	396
4	357	277	1	None	635
5	90	158	None	4	252
6	112	134	None	None	246
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	1127	1031	1	4	2163

CERTIFICATE OF CLERK

I, Carl M. Hitt, the duly appointed, qualified and acting City Clerk of the City of Tucson, Arizona, do hereby certify that the foregoing is a true and correct Extract from the original Minutes of the meeting of the Mayor and Council of said City, held on the 28th day of February, 1944, in so far as said Minutes relate to matters set forth in the above Extract; and, that a quorum was present at said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said City this 29th day of June, 1945.

(Seal)

CARL M. HITT,
City Clerk.

RESOLUTION No. 1964

RATIFYING AUTHORIZATION FOR CONDEMN-
ATION PROCEEDINGS AS SET FORTH IN
RESOLUTION No. 1956.

WHEREAS, the Mayor and Council have heretofore authorized certain condemnation proceedings for the acquisition, as a single public utility, of a combined electric and gas plant and system, more particularly described and set forth in Resolution No. 1956 of the Mayor and Council of the City of Tucson, to which reference is hereby made for a more complete description of said authorization; and

WHEREAS, subsequent to the adoption of said Resolution No. 1956, to-wit, on the 24th day of February, 1944, a majority of the taxpayers of the City of Tucson, who are also qualified electors of said City, voting on the question at a special election, authorized the acquisition of said electric and gas plant and system; now, therefore,

BE IT RESOLVED BY THE MAYOR AND COUN-
CIL OF THE CITY OF TUCSON:

Section 1. That said Resolution No. 1956, and the whole thereof, is hereby ratified and confirmed, and that any and all acts performed by the City Attorney and/or any and all other officers and agents of the City of Tucson under and by virtue of said resolution be, and the same are hereby, ratified, confirmed and approved.

PASSED AND ADOPTED by the Mayor and Council of the City of Tucson, this 28th day of February, 1944.

(signed) HENRY O. JAASTAD,
Mayor.

Attest:

(signed) CARL M. HITT,
City Clerk.